NOT TO BE PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

STEVEN B. HEPPERLE, Petitioner, vs. JOHN AULT, Warden, Respondent.	No. C01-2043-PAZ **ORDER DENYING MOTION FOR EVIDENTIARY HEARING**

This matter is before the court on the motion for evidentiary hearing (Doc. No. 41) filed by the petitioner Steven B. Hepperle ("Hepperle") on February 5, 2003. In support of his motion, Hepperle filed a brief and an appendix (Doc. Nos. 42 & 43) The respondent John Ault ("Ault") filed a resistance and supporting brief on February 18, 2003 (Doc. Nos. 44 & 45), and Hepperle filed a reply to Ault's resistance on February 26, 2003 (Doc. No. 46). The motion is now fully submitted and ready for decision. The court first will discuss the standards for granting evidentiary hearings in *habeas* cases, and then will turn to consideration of Hepperle's motion.

I. STANDARDS FOR EVIDENTIARY HEARINGS

The Supreme Court holds courts to the highest standard in reviewing *habeas* petitions:

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

Harris v. Nelson, 394 U.S. 286, 292, 89 S. Ct. 1082, 1086-87, 22 L. Ed. 2d 281 (1969). The Court held, "It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing." *Harris*, 394 U.S. at 291, 89 S. Ct. at 1086 (citing *Townsend*, 372 U.S. at 313, 83 S. Ct. at 757; *Brown v. Allen*, 344 U.S. 443, 464, No. 19, 73 S. Ct. 397, 97 L. Ed. 469 (1953)).

As to what constitutes "an appropriate showing," the federal *habeas* statute, 28 U.S.C. § 2254, amended as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides explicit requirements:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (1996).

The first inquiry under the statute is whether a petitioner has "failed to develop the factual basis of a claim in State court proceedings." The Supreme Court has explained that this statutory "failure" relates to a lack of diligence "or some other fault," holding "prisoners who are at fault for the deficiency in the state-court record must satisfy a

heightened standard to obtain an evidentiary hearing . . . rais[ing] the bar *Keeney*[1] imposed on prisoners who were not diligent in state-court proceedings." *Williams v. Taylor*, 529 U.S. 430, 433, 120 S. Ct. 1479, 1489, 146 L. Ed. 2d 435 (2000). Thus, the threshold "question is not whether the facts could have been discovered but whether the prisoner was diligent in his efforts . . . [to] search for evidence." *Williams*, 529 U.S. at 435, 120 S. Ct. at 1490. "If there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner . . . will be excused from showing compliance with the balance of the subsection's requirements." *Williams*, 529 U.S. at 437, 120 S. Ct. at 1491.

Preliminarily, then, the court must look to the degree of Hepperle's diligence in developing evidence to support his claim at the relevant stages in the State court proceedings. The inquiry, however, does not end there. Even if the court finds Hepperle has been duly diligent, he still must clear procedural challenges before he is entitled to an evidentiary hearing.

In the situation where a petitioner has been duly diligent in developing the record, courts look to the six-part test described in *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), as modified by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992), and the AEDPA, to determine whether an evidentiary hearing is warranted. As one court has noted, section 2254(e) "is functionally similar to former § 2254(d) such that many courts continue to read that provision in conjunction with the *Townsend* criteria for determining when a hearing must be held." *Vasquez v. DiPaolo*, No. Civ. 96-12261-PBS 1998 W.L. 428012, at *11 n.18 (D. Mass. July 23, 1998) (Alexander, Chief Mag. J.) (citing *Spreitzer v. Peters*, 114 F.3d 1435, 1456-57 n.10 (7th Cir. 1997); *United States ex rel. Patosky v. Kozakiewicz*, 960 F. Supp. 905, 1997 W.L. 143790 at n.6 (W.D. Pa. 1997); *Brewer v. Marshall*, 941 F. Supp. 216, 228-29 (D. Mass.

[1]*Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992).

1996), *rev'd in part*, 119 F.3d 993 (1st Cir. 1997); and *Love v. Morton*, 944 F. Supp. 379, 380 n.1 (D.N.J. 1996)). Accordingly, this court believes consideration of the *Townsend/Keeney* criteria is appropriate here.

In *Townsend*, the Supreme Court considered when a *habeas* petitioner is entitled to a plenary hearing in federal court. *Townsend* arose from the confession of the defendant, an admitted heroin addict, to a murder (among other things), immediately after he was injected with drugs by a police doctor, allegedly to ease Townsend's withdrawal symptoms. Townsend moved to suppress the confession on the basis that it had been coerced by the drug injection[2] and was involuntary. The trial court denied the suppression motion, admitted the confession into evidence, and "made no findings of fact and wrote no opinion stating the grounds of his decision." *Townsend*, 372 U.S. at 302, 83 S. Ct. at 752. In the course of the trial, "additional noteworthy testimony was elicited" that tended to cast doubt upon Townsend's guilt. *See Townsend*, 372 U.S. at 303-04, 83 S. Ct. at 752-53. Nevertheless, the jury found Townsend guilty and he was sentenced to death. His conviction was affirmed on direct appeal. Townsend's post-conviction relief application was dismissed without evidentiary hearing, and the appellate court affirmed. *See Townsend*, 372 U.S. at 295, 83 S. Ct. at 748-49.

Townsend filed a timely petition for writ of *habeas corpus* in federal court. The Supreme Court described the petition's procedural history, noting:

> [The district court], considering only the pleadings filed in the course of that proceeding and the opinion of the Illinois Supreme Court rendered on direct appeal, denied the writ. The Court of Appeals for the Seventh Circuit dismissed [the] appeal. . . . [The Supreme Court] granted a petition for *certiorari*, vacated the judgment and remanded for a decision

[2]Townsend claimed one of the drugs with which he had been injected was a type of "truth serum" that made him highly receptive to suggestion and rendered him incapable of making voluntary statements.

> as to whether, in the light of the state-court record, a plenary hearing was required.
>
> On the remand, the District Court held no hearing and dismissed the petition, finding only that 'Justice would not be served by ordering a full hearing or by awarding any or all of (the) relief sought by Petitioner.' . . . On appeal the Court of Appeals concluded that '(o)n *habeas corpus*, the district court's inquiry is limited to a study of the undisputed portions of the record' and that the undisputed portions of this record showed no deprivation of constitutional rights.

Townsend, 372 U.S. at 296-97, 83 S. Ct. at 749 (citations omitted). The Supreme Court granted *certiorari* to review the standards applied by the lower courts in concluding Townsend was not entitled to an evidentiary hearing. After finding Townsend's petition alleged a deprivation of constitutional rights, the Court considered "whether the District Court was required to hold a hearing to ascertain the facts which are a necessary predicate to a decision of the ultimate constitutional question." *Townsend*, 372 U.S. at 309, 83 S. Ct. at 755.

In reviewing its historical decisions on the issue, the Court, as a preliminary matter, clarified:

> By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . .' *Brown v. Allen*, 344 U.S. 443, 506, 73 S. Ct. 397, 446, 97 L. Ed. 269 [1953] (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense.

Townsend, 372 U.S. at 310 n.6, 83 S. Ct. at 756 n.6. The Court then noted that its intent was to "elaborate [upon] the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal *habeas corpus* proceedings." *Townsend*, 374 U.S. at 310, 83 S. Ct. at 756.

The Court explained it consistently had "upheld the power of the federal courts on *habeas corpus* to take evidence relevant to claims of [unconstitutional] detention[,]" *Townsend*, 374 U.S. at 311, 83 S. Ct. at 756, and held:

> The rule could not be otherwise. The whole history of the writ – its unique development – refutes a construction of the federal courts' *habeas corpus* powers that would assimilate their task to that of courts of appellate review. The function on *habeas* is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal *habeas corpus* only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. *See Frank v. Mangum*, 237 U.S. 309, 345-350, 35 S. Ct. 582, 594-596, 59 L. Ed. 969 [1915] (dissenting opinion of Mr. Justice Holmes). It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal *habeas corpus* is plenary. Therefore, where an applicant for a writ of *habeas corpus* alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

Townsend, 372 U.S. at 311-12, 83 S. Ct. at 756-57.

The Court then considered when the exercise of the power to hold an evidentiary hearing becomes mandatory. The Court found the "appropriate standard" to be as follows:

> ***Where the facts are in dispute***, the federal court in *habeas corpus* must hold an evidentiary hearing if the *habeas* applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Townsend, 372 U.S. at 312-13, 83 S. Ct. at 757 (emphasis added). The Court limited the standard, however, by noting:

> In announcing this test we do not mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such hearings are governed to a large extent by state law.
>
> The existence of the exhaustion of state remedies requirement . . . lends support to the view that a federal hearing is not always required. It presupposes that the State's adjudication of the constitutional issue can be of aid to the federal court sitting in *habeas corpus*.

Id. at n.9 (citations omitted).

Noting that "[s]ome particularization" of the test would be useful to federal *habeas* courts charged with its application, the Court set forth the following six circumstances in which federal courts *must* grant an evidentiary hearing to a *habeas* applicant:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the *habeas* applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313, 83 S. Ct. at 757. The Court then went into considerable detail in explicating each of these circumstances, *see Townsend*, 374 U.S. at 313-19, 83 S. Ct.

at 757-60, providing further direction to federal *habeas* courts in applying the new test which "substantially changed the availability of evidentiary hearings in federal *habeas* proceedings." *Keeney*, 504 U.S. at 5 n.2, 112 S. Ct. at 1717 n.2.

In summary, based on the authorities discussed above, if the court finds Hepperle failed to exercise diligence in developing the factual basis of his constitutional claim in the lower courts, then he is not entitled to an evidentiary hearing unless he meets the test set forth in 28 U.S.C. § 2254(e)(2). If the court finds Hepperle was diligent in his efforts in the State courts, then the court looks to see if any of the six *Townsend* factors would mandate an evidentiary hearing, or if not, then whether such a hearing nevertheless is warranted for this court to make a reasoned decision on Hepperle's *habeas* petition.

II. APPLICATION OF LAW TO HEPPERLE'S MOTION

This case involves a petition for federal writ of *habeas corpus*, in which Hepperle challenges his conviction for the first-degree murder of Diane Voss in 1985. A summary of the facts and procedural history of Hepperle's case appears in this court's Report and Recommendation on Ault's motion to dismiss. (Doc. No. 31, pp. 2-10) In his petition, Hepperle asserts two claims for relief First, he alleges his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), were violated in connection with a custodial interrogation. (*See* Doc. No. , p. 4, § III(A)) Second, he alleges his trial counsel was ineffective for failing to investigate and offer evidence that another man, Dale Viers, was the "real murderer." (*Id.*, § III(B)) Hepperle seeks an evidentiary hearing in connection with this second claim.

Specifically, Hepperle notes that at the hearing on his application for post-conviction relief ("PCR"), his PCR counsel questioned trial counsel about his strategy in focusing on the victim's husband as the possible murderer, and in discounting Dale Viers as a suspect. However, Hepperle further notes his PCR counsel neglected to ask trial counsel about two

key investigative reports that arguably implicate Viers in the murder of Diane Voss. Hepperle requests an evidentiary hearing for the limited purpose of questioning his trial counsel about trial counsel's decision to ignore Viers in light of the two police reports.[3]

Hepperle argues he was duly diligent in developing the facts of his claim in the lower courts. Although, as this court found previously, Hepperle "consistently and diligently pursued his State remedies" in the Iowa courts (*see* Doc. No. 31, p. 17), he nevertheless was not duly diligent in developing the factual basis for his ineffective assistance of counsel claim, insofar as the factual basis would require questioning his trial counsel about the two police reports. As a result, Hepperle is not entitled to an evidentiary hearing unless he meets the requirements of section 2254(e)(2). Hepperle has failed to show his ineffective assistance of counsel claim is predicated upon either "a new rule of constitutional law," or "a factual predicate that could not have been previously discovered through the exercise of due diligence." Accordingly, the court finds Hepperle has failed to meet his burden to show an evidentiary hearing is either warranted or necessary in this case.

Hepperle's excuse for his lack of diligence in developing the factual basis of his claim is his PCR counsel's ineffectiveness in questioning Hepperle's trial counsel during the PCR hearing. Because there is no right to counsel in a PCR action, there can be no cognizable claim for ineffective assistance of PCR counsel in a *habeas* action. *See Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999), *and Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (both citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991)). Similarly, PCR counsel's failure to develop a complete factual basis for Hepperle's claims cannot be grounds for an evidentiary hearing.

The court's task in this case will be to examine the record, which includes the two police reports relating to the investigation of Dale Viers, and to determine whether the Iowa

[3]The two police reports to which Hepperle refers are part of the record in this *habeas* case. (*See* Doc. No. 43, Habeas Appendix)

courts' decisions were "either (1) '*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) '*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" *See Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 1519, 146 L. Ed. 2d 389 (2000) (quoting 28 U.S.C. § 2254(d)(1); emphasis by the Court). The record is complete and adequate for the court to rule on Hepperle's petition.

Accordingly, for the reasons discussed above, Hepperle's motion for an evidentiary hearing is **denied**.[4] Hepperle is directed to file his opening brief on the merits in this case **by May 12, 2003**. Ault must file his responsive brief within **30 days** after Hepperle files his brief. Hepperle may file a reply brief, if desired, within **10 days** after Ault files his brief. The parties are cautioned that these deadlines will not be continued further.

IT IS SO ORDERED.

DATED this 21st day of April, 2003.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[4]To the extent Hepperle's motion can be read as a request for discovery, the court, in the exercise of its discretion, **denies** the motion. *See* Rule 6(a), Rules Governing Section 2254 Cases in the United States District Courts.